Comments on Closed Session
Draft Provisions 12-21-06

Overall comments (My comments are in blue):

The proposed closed session provisions raise some concerns. I'll get into some details below, but first some comments on the basic approach taken in the draft provisions are appropriate.

***First*, the draft provisions do not significantly broaden the disclosure of information regarding closed sessions. For example, the draft provisions regarding agenda disclosures (Section 1) simply reiterate the requirements already imposed by the Brown Act (see Government Code section 54954.5).**

***Second*, some of the draft provisions seem to permit greater government secrecy. Here are some of our main concerns:**

(1) The memorandum from counsel suggests that only seven out of approximately 60 City policy bodies are currently allowed to conduct closed sessions. However, nothing in the draft closed session provisions limits them to those seven bodies currently allowed to conduct closed sessions. If only the seven bodies specifically identified in the memorandum are allowed to hold closed sessions, the ordinance should say that.

(2) As written, the draft provisions relating to "Closed Sessions: Permitted Topics" (Section 3) would actually expand the circumstances in which City policy bodies could hold closed sessions. I am certain this was not the intent, but the list of broad topics in section 3 is not carefully limited or defined, as are the comparable provisions of other Sunshine Ordinances, or even as they are in the Brown Act.

(3) The draft provisions relating to the "Statement of Reasons for Closed Sessions" (Section 4) do not, as the draft suggests, track the Milpitas Open Government Ordinance. In fact, they are not as rigorous as the Brown Act. They omit a key requirement that is included in the Brown Act and in most other Sunshine Ordinances – that the only matters that can be addressed in the closed session are described to the public prior to the closed session. In addition to the Brown Act, that's the language that's also in the Milpitas ordinance (section I-310-2.100) and San Francisco ordinance (section 67.11).

***Third*, although the Task Force specifically asked for provisions giving greater disclosure of information regarding closed sessions, the draft provisions regarding "Disclosure of Closed Session Discussions and Actions" (Section 5) do not provide any significant improvement over the Brown Act.**

With respect to approval of real estate deals, major settlements, and union contracts, disclosure should come before the deal is final, not after. With respect to employee discipline, the public should be given complete information about official misconduct by city officials. Disclosure should be consistent with current California law, i.e., all information relating to the charge, complaint, and/or discipline should be disclosed if discipline is imposed or if the charge or complaint is determined to have been well-founded. Since disclosure of such information is already required by California law (specifically, the California Public Records Act), release of this information will not subject the City to any liability.

Fourth, the Task Force has already determined that closed sessions should be recorded, and the recordings should be disclosed when the need for confidentiality has passed. The draft provisions on disclosure of recordings (Section 2 and Section 6) are a start toward implementing this, but they are not clear and they do not appear to provide for predictable disclosure. There are many situations where recordings should be routinely disclosed. For example, the discussion of a particular lawsuit should generally be disclosed once the lawsuit has been resolved. The discussion of a union contract or real estate deal should be disclosed once the agreement is final. Furthermore, the ordinance needs to lay out a reasonable process for opening recordings to the public. Here are some suggestions:

(1) The ordinance should specify that all recordings become public within a certain time (e.g., two years) or based on a certain event (e.g., settlement of litigation, award of a contract, etc.), unless the City Attorney certifies that they must remain secret. There should be a high standard for certifying that a recording remain secret after it would normally become public.

(2) Any certification should specify a time or event upon which the certified recording will become public, or should expressly state that the recording must be permanently sealed and explain why. In particular, if there is any legal authority (a statute, an ordinance, a case) that the City Attorney is relying on, that authority should be identified.

(3) A majority of the policy body should be required to vote that the certified recording remain secret.

(4) There has to be a meaningful, affordable way to challenge certifications. It's fine to provide for challenges to be brought in the courts, but for most people and most businesses, hiring a lawyer and going to court is simply too expensive. The ordinance should require the creation of a Sunshine Commission, with the responsibility and power to consider complaints, determine violations, and enforce compliance with the ordinance, including determining whether recordings should be disclosed. We'll be discussing this more when we get to enforcement.

Here are some more specific comments on the draft provisions, and some suggested answers to questions posed by counsel in those provisions:

Specific Comments on the Draft Provisions

1. Agenda Disclosures: Closed Sessions.

A. Items described on the written agenda for closed session must use the following format:

My notes below describe the information that should be disclosed prior to any closed session, in addition to that suggested in the draft provisions (which simply reiterate the requirements of the Brown Act).

In addition to these specific suggestions, the ordinance should specifically say:

(1) That the information required to be provided under this section is *in addition to* the "brief, general description" of each agenda item that is required under the Brown Act (and that should be required under this ordinance), *not* a substitute for that description. That is the way the San Francisco ordinance works. (See section 67.8(a).)

(2) That agenda descriptions can include additional information (so that it is clear that the forms provided by this section are the minimum, not the maximum, amount of information that can be provided).

(3) That agenda descriptions of closed sessions cannot be misleading. This is an issue that has come up many times – one example is the City's discussion of the proposed downtown soccer stadium. The City continues to say that the discussion of that topic was just fine—which only reinforces the need for reform. See other attachment – a story from the Mercury News.

LICENSE/PERMIT DETERMINATION

The type of license, permit, or other authority at issue should also be identified. San Francisco currently requires that this information be provided.

CONFERENCE WITH REAL PROPERTY NEGOTIATORS

If possible, a likely value or range of values should also be provided. A final price generally won't be known until the deal is done, but it should be possible to say that the value of the transaction will likely be over $100,000, over $1,000,000, or over $10,000,000.

(Note: This is not done by other ordinances. Remember that we are not requiring the discussion be public, but only that this kind of information be included in the closed session notice. This is designed to give the public some idea of whether a transaction is important. The same reasoning applies to the items below.)

CONFERENCE WITH LEGAL COUNSEL--EXISTING LITIGATION

At least for existing litigation, the amount of money potentially at risk should be identified if a lawsuit seeks money. If the lawsuit seeks some other kind of relief (for example, an injunction), that should be identified. It is generally a simple matter to get this information from the complaint in the lawsuit. This will give the public at least a rough idea of what is at stake in the case.

LIABILITY CLAIMS

Again, liability claims usually specify the amount of damages sought, or any other kind of relief that is requested. That information should be disclosed, if included in the claim.

PUBLIC EMPLOYEE APPOINTMENT

Titles alone are not be enough. The department or agency to which the appointment will be made should also be provided.

PUBLIC EMPLOYMENT

Same.

PUBLIC EMPLOYEE PERFORMANCE EVALUATION

For routine performance evaluations, the name of the employee should be provided. San Francisco requires this information be disclosed.

PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE

The number of employees and the agency or department involved should be disclosed.

CONFERENCE WITH LABOR NEGOTIATORS

The public should be informed as to the nature of the negotiations, including the issues to be discussed (i.e., wages/salaries, hours, working conditions, benefits, or some combination).

In addition, if an existing contract or memorandum of understanding is being renewed or renegotiated, the name of the agreement and information on how to obtain a copy should be provided.

This type of information is required to be provided by the San Francisco ordinance.

B. In addition to describing items on the written agenda for closed session in the format set out in Section 1(A)(3)(a), when describing existing litigation, the written agenda must identify the court, case number and date the case was filed, unless disclosing the information would jeopardize service of process or existing settlement negotiations.

2. Additional Requirements for Closed Session.

A. All closed sessions of any policy body must be audio recorded in their entirety. Closed session recordings are confidential unless and until they are made available as provided in this section. All recordings must be retained for at least **5** years from the date of (1) disclosure required in Section 5(A); or (2) certification of non-disclosure permitted in Section 6.

Question: What is the appropriate length of time to retain the recordings?

• The Task Force's attorney believes 2 years is too short.

• The City Clerk determined that 2 years is the amount of time other California cities that record closed session – Monterey, Santa Clarita, Riverside and Hayward – retain the recordings.

Both San Francisco and Milpitas require recordings to be made and preserved for 10 years. The importance of a decision made in secret may not be apparent at the time. Indeed, the decision may be completely unknown to the public for many years. In addition, the problems with closed sessions often are not just individual decisions, but a pattern of improperly discussing matters in closed session. Two years is not long enough. Five years should be the minimum.

B. Consistent with the certification process described in Section 6, closed session recordings must be made available whenever the rationale for closing the session is no longer applicable, including, but not limited to, the conclusion of negotiations or litigation.

Question: Should there be a mechanism to determine when the "rationale is no longer applicable"?

Question: Should the public be notified when the closed session recording becomes available?
• If so, how?

The answer to both of these questions is yes. The ordinance will be clearer and more effective if it establishes criteria for disclosure. We should be able to establish criteria for union agreements, employee contacts (for higher-level officials not represented by unions), real estate deals, and employee discipline.

Giving public notice should be pretty simple—for example, posting a notice on the City's website that a closed session recording has just been released. It would also be a simple matter to maintain a list of all closed session recordings that have been released.

We need to keep in mind that a closed session may address multiple topics, and that it may be appropriate to release one part of a closed recording and not another. The ordinance should provide for this.

C. When the justification for closed session is "anticipated litigation", the recording must be made available: (1) If a lawsuit is not filed, upon expiration of the statute of limitations; or (2) if a lawsuit is filed, as soon as the controversy leading to anticipated litigation is settled or concluded. In any event, the policy body or the City Attorney's Office must disclose upon request (1) whether anticipated litigation developed into a lawsuit; and (2) the court, case number and date the lawsuit was filed.

3. Closed Sessions: Permitted Topics.

Any policy body that holds closed session is permitted to discuss the following topics:

As discussed above, this section as written would expand the circumstances in which City policy bodies could hold closed sessions. The language of the ordinance needs to be as clear as possible.

What we should be doing regarding permitted closed session topics is saying: You can hold closed sessions in the circumstances permitted by the Brown Act, except when the ordinance imposes special requirements or limitations.

4. Statement of Reasons for Closed Sessions.

A. Before any closed session a policy body must meet in open session to (1) state the reason for closed session for each item on the agenda; and (2) cite the statutory authority for closed session for each item on the agenda, including the specific section of the Brown Act or other legal authority.

I mentioned this above. This section omits a key requirement that is included in the Brown Act and in other Sunshine Ordinances. We need to make it clear—as the Brown Act does—that the only matters that can be addressed in the closed session are those described in the statement provided to the public prior to the closed session.

This is something that should also be included in the agenda requirements.

In addition, like the written agenda provisions, this section should say that descriptions of what is to be discussed in closed session cannot be misleading.

B. If an item is added to the agenda (1) upon a determination by a majority vote of the policy body that an emergency situation exists; (2) upon a determination by a 2/3 vote of the members of the policy body present at the meeting, or if less than 2/3 of the members are present, on a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the policy body after the agenda was posted; or (3) the item was posted for a prior meeting of the policy body occurring not more than five calendar days before the date action is taking on the item and at the prior meeting the item was continued to the meeting at which action is being taken, the policy body must state in open session the fact of the addition to the agenda and why the item is being added.

I don't think the provisions about adding items to the closed session agenda belong here. These are general provisions, that will be applied (in some form) to both open and closed session. In addition, this appears to relieve the body of the requirement to make a public statement of what is to be discussed in closed session in a prior, open session, if one of these circumstances is invoked. All of these exceptions are described in much more detail in the Brown Act and in other ordinances. For example, the Brown Act and other ordinances specifically define the emergencies that can be discussed without the normal notice.

C. Only items on the written agenda or added pursuant to Section 4(B) can be considered during closed session. Any action taken on an item that is not described in accordance with this section is subject to invalidation pursuant to the provisions of Government Code Section 54960.1.

As noted, the ordinance needs to be clear that only the items on the written agenda and described in open session before the closed session can be discussed in closed session.

5. Disclosure of Closed Session Discussions and Actions.

A. After every closed session, a policy body must meet in open session to make the following disclosures:

(1) Approval of an agreement concluding real estate negotiations as follows:

As discussed above, real estate deals can be some of the most significant, expensive, and long-term commitments a city makes. At a minimum, these agreements should be open to the public once the negotiations are complete, but before they are finally approved. If they are not, the public is simply presented with a "done deal." I suggest that real estate deals be made public 10 days before the meeting at which they will be finally approved.

(2) Approval given to its legal counsel to defend, or seek or refrain from seeking appellate review or relief, or to enter as an amicus curiae in any form of litigation shall be reported in open session at the public meeting during which the closed session is held. The report shall identify, if known, the adverse party or parties and the substance of the litigation. In the case of approval given to initiate or intervene in an action, the announcement need not identify the action, the defendants, or other particulars, but shall specify that the direction to initiate or intervene in an action has been given and that the action, the defendants, and the other particulars shall, once formally commenced, be disclosed to any person upon inquiry, unless to do so would jeopardize the policy body's ability to effectuate service of process on one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(3) Approval given to its legal counsel of a settlement of pending litigation at any stage prior to or during a judicial or quasi-judicial proceeding shall be reported after the settlement is final, as specified below:

(a) If the policy body accepts a settlement offer signed by the opposing party, the policy body shall report its acceptance and identify the substance of the agreement in open session at the public meeting during which the closed session is held.

(b) If final approval rests with some other party to the litigation or with the court, then as soon as the settlement becomes final, and upon inquiry by any person, the policy body shall disclose the fact of that approval, and identify the substance of the agreement.

Again, this provision provides no advance notice of settlements to the public, and hence no ability for the public to weigh in. San Francisco and Milpitas already address this situation. At a minimum, we should use the same language they do:

"A policy body shall neither solicit nor agree to any term in a settlement which would preclude the release of the text of the settlement itself and any related documentation communicated to or received from the adverse party or parties. Any written settlement agreement and any documents attached to or referenced in the settlement agreement shall be made publicly available at least 10 calendar days before the meeting of the policy body at which the settlement is to be approved to the extent that the settlement would commit the City or a department thereof to adopting, modifying, or discontinuing an existing policy, practice or program or otherwise acting other than to pay an amount of money less than $50,000. The agenda for any meeting in which a settlement subject to this section is discussed shall identify the names of the parties, the case number, the court, and the material terms of the settlement. Where the disclosure of documents in a litigation matter that has been settled could be detrimental to the city's interest in pending litigation arising from the same facts or incident and involving a party not a party to or otherwise aware of the settlement, the documents required to be disclosed by subdivision (b) of this section need not be disclosed until the other case is settled or otherwise finally concluded."

(4) Disposition reached as to claims shall be reported as soon as reached in a manner that identifies the name of the claimant, the name of the policy body claimed against, the substance of the claim, and any monetary amount approved for payment and agreed upon by the claimant.

This is essentially the same as the settlement of litigation, and should be treated in the same way.

(5) Action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or of the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any.

Question: The Brown Act does not require disclosure of closed session discussions about employee discipline (short of dismissal). What should happen to recordings of closed sessions about employee discipline matters?

- **The Task Force's attorney suggests that the recordings could become accessible if the charges are substantiated or reasonably supportable (or something similar).**

- **The City's legal staff notes that the City has a duty to protect the private information of its employees and thus could be subject to lawsuits by its employees for disclosure of disciplinary information as suggested by the Task Force's attorney.**

The Public Records Act already requires that certain information be made public regarding the discipline of public officials and public figures. Basically, if charges are well-founded or if discipline is imposed, all information relating to the charges and the discipline has to be released. The Sunshine Ordinance should work the same way. At a minimum, any well-founded charges and any discipline imposed for misconduct should be summarized publicly after disciplinary action is taken.

(6) Approval of an agreement concluding labor negotiations with represented employees shall be reported after the agreement is final and has been accepted or ratified by the other party. The report shall identify the item approved and the other party or parties to the negotiation.

Again, union agreements should be made public BEFORE they are approved. They can be fully negotiated, but they should not be finally approved without any public input whatsoever. All the negotiations are secret, so the public has no opportunity to weigh in during the negotiation process. San Francisco and Milpitas require disclosure 15 days before the meeting at which the agreement is to be presented.

(7) Pension fund investment transaction decisions shall be disclosed at the first open meeting of the policy body held after the earlier of the close of the investment transaction or the transfer of pension fund assets for the investment transaction.

B. In addition to the requirements under Section 5(A), a policy body may, upon a determination that disclosure is in the public interest and by motion and majority vote in open session, disclose any portion of its discussion that is not confidential under federal or state law. The disclosure must be made through the presiding officer of the policy body or his or her designee who was present in the closed session.

C. Disclosures required to be made ~~immediately~~ by Section 5(A) may be made orally or in writing, but must be supported by copies of any contracts, settlement agreements, or other documents related to the ~~transaction~~ action that was approved in the closed session. The supporting documents that embody the information required to be disclosed, except for documents otherwise ~~protected~~ required to kept confidential by state or federal law, must be provided to any person who has made a written request about that item or who has made a standing request for all such documentation as part of a request for notice of meetings.

I have made a few suggested changes to this section. Basically, the word "immediately" is a problem because it is not clear what it means. In addition, only information that HAS to be kept secret under state or federal law should be secret under this section. Otherwise, this section again would be meaningless, because any information that the City has discretion to withhold under the Public Records Act or the Brown Act would not have to be provided.

D. A written summary of the disclosures required to be made ~~immediately~~ by Section 5(A) must be posted by the close of business on the next business day

after the open session in the place where the agendas of the policy body are posted.

See above.

6. Certification of Closed Session Discussions and Actions.

The Task Force has previously discussed the idea of allowing the City Attorney to specify certain recordings (or portions of recordings) that should not be disclosed because secrecy is vital to the protection of the public interest. But it is important to limit the City Attorney's ability to invoke this exception. It should apply only if and when disclosure is very likely to cause harm.

As presently worded, it is not clearly how this exception would work. It could be read to give the City Attorney a free pass to keep anything secret indefinitely.

My suggestions:

(1) As noted above, specify when recordings on certain subjects will normally become public, and as to all other subjects, provide that the recordings will become public after a specified period of time (e.g., two years) unless certified by the City Attorney.

(2) Specify that the City Attorney can certify a recording only if there is a substantial probability that disclosure at the time otherwise required by the ordinance will cause serious harm to the public interest.

(3) Require the City Attorney to specify the type of harm that will result, and to specify when the recording CAN be made public (or that it must be kept secret forever, and specify why in as much detail as possible).

(4) Require a majority of the public body to vote to confirm the City Attorney's decision.

(5) Require the basis for and the vote on the decision to be made public.

A. After an item has been discussed in closed session, the City Attorney may certify that the recording of the closed session on that matter should not be made available if he or she makes a specific finding that the public interest in non-disclosure outweighs the public interest in disclosure. The finding must be specific enough for the public to understand the reason for the certification without disclosing confidential information.

B. After every closed session, a policy body must meet in open session to report any certifications.

C. To contest the City Attorney's certification of a recording of closed session on a matter, any interested person may file an action by mandamus or injunction for the purpose of obtaining a judicial determination that the certification should be overruled. The City has the burden of proving that the certification is appropriate.

Question: How should the appeal process be structured?

- **The City's legal staff suggests that the process follow the Brown Act – i.e. the challenger of certification files a complaint in Superior Court and the Superior Court Judge decides the matter.**

- **The Task Force's attorney has suggested that a retired judge or attorneys from the Bar Association or both should decide.**

As discussed above, making individuals or businesses go to court to enforce this or any other provision of the ordinance means that the ordinance will rarely be enforced. People need an economical and expeditious means of enforcement.

A Sunshine Commission should be created, along the lines of the Elections Commission, the Human Rights Commission, or the commission for neighborhoods currently being discussed by Mayor Reed. The commission should be allowed to interpret and enforce the ordinance, with its decisions being binding on the City. It should also be allowed to recommend revisions to the ordinance to the City Council for implementation. San Francisco has such a commission.

The appointment of the commission is a key issue. The commission has to be independently appointed. A commission appointed by the City Council would be a commission appointed by the fox to guard the henhouse. I have a couple of alternate suggestions:

(1) Have the commission appointed by a body of three people, one appointed by the City Council (but not on the Council), one appointed by the heads of the neighborhood associations, and one appointed by the League of Women Voters. Or:

(2) Allow the City Council to appoint the commission, but require that the commissioners represent certain groups. This is the approach taken by San Francisco. The San Francisco ordinance says:

"There is hereby established a task force to be known as the Sunshine Ordinance Task Force consisting of eleven voting members appointed by the Board of Supervisors. All members must have experience and/or demonstrated interest in the issues of citizen access and participation in local government. Two members shall be appointed from individuals whose names have been submitted by the local chapter of the Society of Professional Journalists, one of whom shall be an attorney and one of whom shall be a local journalist. One member shall be appointed from the press or electronic media. One member shall be appointed from individuals whose names have been submitted by the local chapter of the League of Women Voters. Four members shall be members of the public who have demonstrated interest in or have experience in the issues of citizen access and participation in local government. Two members shall be members of the public experienced in consumer advocacy. One member shall be a journalist from a racial/ethnic-minority-owned news organization and shall be appointed from individuals whose names have been submitted by New California Media. At all times the task force shall include at least one member who shall be a member of the public who is physically handicapped and who has demonstrated interest in citizen access and participation in local government. The Mayor or his or her designee, and the Clerk of the Board of Supervisors or his or her designee,

shall serve as non-voting members of the task force. The City Attorney shall serve as legal advisor to the task force. The Sunshine Ordinance Task Force shall, at its request, have assigned to in an attorney from within the City Attorney's Office or other appropriate City Office, who is experienced in public-access law matters. This attorney shall serve solely as a legal advisor and advocate to the Task Force and an ethical wall will be maintained between the work of this attorney on behalf of the Task Force and any person or Office that the Task Force determines may have a conflict of interest with regard to the matters being handled by the attorney."